93-182

No. ——

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

HOLABIRD SPORTS DISCOUNTERS,
Petitioner,

v.

TENNIS TUTOR, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Circuit misapplied the standard of evidence required by *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984) in ruling on summary judgment that an agreement to restrict price advertising did not constitute a contract, combination or conspiracy under Section 1 of the Sherman Act.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reprinted at Appendix ("App.") 1a-4a. The opinion of the United States District Court for the District of Maryland is reprinted at App. 5a-20a. Both are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 7, 1993. App. 1a. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Sherman Antitrust Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

This is an action brought by Holabird Sports Discounters ("Holabird") against Tennis Tutor, Inc. ("TTI") under the Sherman Antitrust Act, 15 U.S.C. § 1.

TTI manufactures a unique, portable, battery-operated tennis ball practice machine known as the Tennis Tutor. App. 2a. TTI's president has testified that the Tennis Tutor is the only battery operated tennis ball machine available on the market in the United States, Greene Depo. at 35-36 (App. 22a), and that 70 or 80% of the public tennis courts do not have accessible electric power. Greene Depo. at 151 (App. 22a-23a). Therefore, there is no interbrand competition for battery operated tennis ball machines, which are the only type usable on 70 or 80% of the public tennis courts in America.

At all pertinent times, TTI imposed a policy upon its dealers which provided that TTI "will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than the suggested retail price, including call for price advertisements." App. 2a.

Holabird, a mail order sporting goods distributor, was a dealer of TTI during 1989-90. App. 2a. After distributing the Tennis Tutor for more than a year, Holabird placed an advertisement for the machine in the October 1990 issue of *Tennis* magazine. App. 2a-3a. Upon learning of this, TTI terminated Holabird as a distributor for violating TTI's policy. App. 3a, 6a. TTI told Holabird it would be reinstated if it agreed in writing to abide by the policy. App. 6a. Holabird refused, and thereafter filed this action. Jurisdiction in the district court was conferred by 28 U.S.C. §§ 1331, 1332 and 1337 and 15 U.S.C. §§ 15 and 22.

Following discovery TTI moved for summary judgment on the ground (among others) that the evidence failed to establish any contract, combination or conspiracy. Holabird opposed the motion, relying on three factors as evidence of contract, combination or conspiracy.

First, on at least two occasions, TTI sought and obtained the agreement of distributors to its advertising policy. App. 11a-12a. On each of these occasions, TTI's president observed an offending advertisement in *Tennis* magazine, contacted the distributor involved and demanded that the advertisement be removed before he would supply the distributor with any Tennis Tutor ball machines. Both distributors agreed to abide by the advertising restrictions and to remove offending advertisements from future issues of *Tennis* magazine. App. 11a-12a.

Second, after TTI had terminated Holabird as a dealer for violating the policy, TTI told Holabird it would be reinstated in return for a written acknowledgment of and agreement to abide by the policy. App. 6a. Holabird offered this to show TTI's intent to "contract, combine or conspire" rather than to act unilaterally. Holabird refused to enter into such an agreement. App. 6a.

Third, after termination Holabird purchased a limited number of Tennis Tutor ball machines from so-called "diverters," *i.e.*, dealers or others who sold Tennis Tutor ball machines to Holabird. Upon learning of this, TTI told the diverters that unless they agreed to stop selling to Holabird they, too, would be terminated. In some instances, TTI, in fact, terminated them. At least one of the dealers which "diverted" the Tennis Tutor to Holabird told TTI that in the future the diverter would not sell to Holabird. App. 12a.

Notwithstanding the foregoing the district court granted TTI's motion for summary judgment on the sole ground that "Holabird has not produced sufficient evidence that TTI entered into a contract, conspiracy or combination with any other entity in its adoption of it (sic) advertising policy, or in its termination of Holabird. . . ." App. 6a. The court acknowledged that "there may be some superficial similarity between the actions deemed a conspiracy in *Monsanto* and [*United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960)] and the actions of TTI," but concluded that "Holabird has not produced evidence that 'tends to exclude the possibility' that TTI acted independently." App. 15a, 20a. The Fourth Circuit affirmed, "agreeing that, under [*Parkway Gallery Furn., Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989)], appellant failed to identify sufficient evidence tending to exclude the possibility that TTI and its dealers acted independently. . . ." App. 4a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE SUFFICIENCY OF EVIDENCE TO SHOW A CONTRACT, COMBINATION OR CONSPIRACY UNDER 15 U.S.C. § 1.

This case merits review to resolve a conflict in the lower courts as to when a manufacturer's independent action crosses the line to become concerted action amounting to a contract, combination or conspiracy under Section 1 of the Sherman Act, 15 U.S.C. § 1. The existing framework is difficult to implement as evidenced by conflicts among the courts of appeals.

The longstanding rule is that "[i]ndependent action is not proscribed." *Monsanto,* 465 U.S. at 761 (citing *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919)). A "manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply." *Monsanto,* 465 U.S. at 761. However, when a manufacturer seeks and obtains acquiescence or agreement to its resale price "policy" (or its non-price, anti-competitive "policy"), it loses its protection under *Monsanto.* 7 Phillip E. Areeda, *Antitrust Law* §§ 1446-48C at 82-104 (1986).

The standard for establishing concerted action which amounts to contract, combination or conspiracy has been stated as follows:

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. With respect to a "common scheme" this Court has explained:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both *that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.*

Id. at 765 n.9 (emphasis added).

Here, the Fourth Circuit, in effect, ruled that individual discussions in which "the distributor communicated its acquiescence or agreement, and [ ] this was sought by the manufacturer" did not rise to the level of a contract, combination or conspiracy. In this regard the Fourth Circuit's ruling sharply conflicts with decisions of the Eighth and Eleventh Circuits, which hold that individual discussions between manufacturer and distributor were sufficient. The Fourth Circuit, itself, previously had recognized this conflict:

> We are aware that the Eighth Circuit has held that evidence that, following termination of a discounter after a dealer complained, a manufacturer reported to the dealer that "the problem had been taken care of," coupled with the discounter's testimony that "the only reason [a manufacturer's employee] could figure out that they were terminating me is to give [the dealer] some relief," sufficiently tended to exclude the possibility that the manufacturer and dealer were acting independently. *McCabe's Furniture v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005, 108 S. Ct. 1728, 100 L.Ed.2d 193 (1988). Similarly, the Eleventh Circuit has stated that evidence that, following a complaint about a discounter, a manufacturer notified the complaining dealer that "corrective action has been taken" and requested that the dealer notify it of any further problems, when coupled with the dealers' "thank you" that created an inference that the dealer agreed to notify the manufacturer, met *Monsanto's* requirements "precisely." *Helicopter*

> *Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 & n. 6 (11th Cir. 1987).
>
> In our view, however, those decisions have in effect misconstrued "tends to exclude the possibility" of independent conduct, *Matsushita*, 475 U.S. at 588, 106 S.Ct. at 1357, to mean something like "arguably consistent with the possibility of a conspiracy."

Parkway Gallery, 878 F.2d at 806 n.4. This case merits review to resolve this important conflict.

II. THE DECISION BELOW MISAPPLIES THIS COURT'S "TENDS TO EXCLUDE" REQUIREMENT IN *MONSANTO*.

As noted earlier, in awarding summary judgment against Holabird, the court held that evidence of actual agreements between TTI and distributors to abide by TTI's policy was insufficient to show contract, combination or conspiracy. In doing so the Court necessarily drew inferences against Holabird notwithstanding the rule that inferences must be drawn in favor of the party opposing a motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It also rejected as "superficial" the similarity between the evidence presented here and the evidence presented in *Monsanto*.

In *Monsanto* the evidence was that after the manufacturer had terminated an offending distributor, the manufacturer approached other price cutting distributors and said that if they did not maintain the suggested retail price, they would not receive the manufacturer's product. *Monsanto*, 465 U.S. at 765. One of the distributors balked, and the manufacturer complained to the distributor's parent company which instructed the distributor to comply. *Id.* The distributor then informed the manufacturer that it would comply. *Id.* The Court stated "[e]vidence of this kind plainly is relevant and persuasive as to a meeting of the minds. [footnote omitted]" *Id.*

Moreover, the Court held the evidence "sufficient" to establish contract, combination or conspiracy. *Id.*

The *Monsanto* evidence is analytically indistinguishable from the evidence here that TTI sought and received agreements from two of its dealers to comply with TTI's price advertising policy, sought (but did not receive) an agreement from Holabird, and sought and received agreement from other dealers not to sell the machines to Holabird. In the instant case (and in *Parkway Gallery*) the Fourth Circuit ignored that portion of the *Monsanto* opinion that the "tends to exclude" requirement means only "that the manufacturer and others had a conscious commitment to a common scheme", *Monsanto* at 768, and that "a common scheme" is evidenced when the distributor communicates its acquiescence or agreement to the manufacturer's restriction and this was sought by the manufacturer. *Id.* at 765 n.9. In effect, the Fourth Circuit requires a plaintiff to present evidence which *totally* excludes (rather than "tends to exclude") the possibility of independent action by a manufacturer and others, a requirement found nowhere in *Monsanto*.

In *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988) (Posner, J.), the court held that an agreement can be "implicit, or signified by conduct in lieu of promissory language." *Id.* at 1164. Judge Posner warned:

> [W]e do not think the Court [in *Monsanto*] intended to go so far as to rule that if a supplier telephones a dealer and tells him, '[r]aise your price by next Thursday, or I'll ship you defective goods,' and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer's resale price. *If it were not, there would be very little left of the rule against vertical price-fixing. . . .*

Id. (citing *Monsanto*, 465 U.S. at 761 n.7) (emphasis added). The Fourth Circuit ignored this warning.

CONCLUSION

By failing to heed Judge Posner's warning, the Fourth Circuit, in essence, has excised the prohibition against unreasonable vertical restraints from the antitrust laws.[1] Additionally, the court's reasoning conflicts with the interpretations of *Monsanto* by the Eighth and Eleventh Circuits. Lastly, the court has misapplied the *Monsanto* standard for proving contract, combination or conspiracy. Under these circumstances, the case is worthy of review, and Holabird asks that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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[1] In *Parkway Gallery* the court ruled that the same standard for contract, combination or conspiracy applies whether the case is brought under a *per se* or rule of reason analysis. *Parkway Gallery*, 878 F.2d at 805. Thus, *Parkway Gallery's* holding affects all vertical restraint cases.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-2504

HOLABIRD SPORTS DISCOUNTERS, a Maryland General Partnership,
Plaintiff-Appellant,

v.

TENNIS TUTOR, INCORPORATED, a California Corporation,
Defendant-Appellee,

and

PRINCE MANUFACTURING, INCORPORATED,
Party in Interest.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William M. Nickerson, District Judge.

(CA-91-2208-WN)

Argued: March 31, 1993

Decided: May 7, 1993

Before RUSSELL and LUTTIG, Circuit Judges, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

PER CURIAM:

Holabird Sports Discounters ("Holabird") brings this appeal from an order of the district court granting summary judgment to Tennis Tutor, Incorporated ("TTI"), on Holabird's action under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. We affirm.

TTI manufactures a unique, portable, battery-operated tennis ball practice machine known as the Tennis Tutor. TTI markets Tennis Tutors primarily through a national network of 126 dealers. Holabird, a mail order sporting goods distributor, was one of TTI's dealers during 1989-90. The relationship between TTI and its dealers is governed in large part by a "Statement of Policy," which provides, *inter alia*, that "[TTI] will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements." J.A. at 151. This advertising restriction, which was independently formulated by appellee, does not prevent dealers from selling Tennis Tutors at whatever price they choose; instead, it only prohibits advertising the machines for sale at less than suggested retail price in regional or national publications. Advertising in local publications, direct mail flyers and catalogs, computer buying networks, and other media is not affected by the restriction. The purpose of TTI's advertising restriction is to maintain a healthy national distribution system through the prevention of "free-riding" by national mail order discount houses such as Holabird.[1]

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[1] Free-riding occurs when a discounter takes advantage of customer services offered by local dealers. Since the Tennis Tutor is a complex, innovative machine, most prospective purchasers would not fully appreciate the benefits of the product unless dealers make the effort to explain the machine, set up demonstrations, and allow trial use. Without the advertising restriction, national mail order

TTI terminated Holabird's dealership in September, 1990, upon learning that appellant had violated the advertising restriction by placing an advertisement in *Tennis Magazine* that requested readers to call for the price of Tennis Tutors. Subsequently, appellee took independent action to ensure that other dealers did not divert Tennis Tutors to Holabird without TTI's consent. *Id.* at 571, 646-47. On two other occasions, TTI unilaterally enforced the advertising restriction, in one instance informing a prospective Tennis Tutor dealer of a violation,[2] and in the other apprising a dealer, which inadvertently had not been told of the restriction, that one of its advertisements violated TTI's policy. Both firms informed TTI that they would voluntarily comply with the advertising restriction in the future. *Id.* at 645-46.

On August 5, 1991, Holabird brought this action against TTI in district court, alleging that TTI's imposition and enforcement of the advertising restriction violated section 1 of the Sherman Act.[3] After nearly one year of discovery, TTI moved for summary judgment. The district court granted the motion on October 30, 1992.

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discounters that offer no such special services could exploit the efforts of full-service local dealers: Customers would go to their local dealer to gather information about the Tennis Tutor, but could then order the machine for a lower price from a discounter that could afford to charge less than the local dealer because it did not have to bear the expense of customer services. According to TTI, this result would cause disgruntlement among local dealers, who would respond by refusing to carry Tennis Tutors or by cutting back on their services, either outcome of which would be detrimental to TTI. *See id.* at 368K-L, 640-41.

[2] The dealer, Sports Express, was deciding whether or not to become a TTI dealer, and placed the offending advertisement in an effort to gauge customer interest in the product. Sports Express was unaware of the restriction when it placed the advertisement.

[3] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." 15 U.S.C. § 1.

Viewing the case in light of *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and this court's application of *Monsanto* in *Parkway Gallery Furniture, Inc.* v. *Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), the district court held that Holabird had failed to produce sufficient evidence that TTI had entered into a contract, conspiracy, or combination with any of its dealers through its adoption or enforcement of the advertising restriction or through its termination of Holabird. Because of Holabird's failure to establish this necessary element of its Sherman Act claim, the court concluded, TTI was entitled to judgment.

We have read the briefs, heard oral argument, and given full consideration to Holabird's contentions. Finding no error in the thorough opinion of the court below, *Holabird Sports Discounters* v. *Tennis Tutor, Inc.*, Civil No. 91-2208-WN (D. Md. Oct. 30, 1992), and agreeing that, under *Parkway Gallery*, appellant failed to identify sufficient evidence tending to exclude the possibility that TTI and its dealers acted independently with regard to the advertising restriction, we affirm on the reasoning of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WN-91-2208

HOLABIRD SPORTS DISCOUNTERS

v.

TENNIS TUTOR, INC.

MEMORANDUM

Before the Court is Defendant's Motion for Summary Judgment (Paper No. 28). Plaintiff filed an Opposition (Paper No. 31) and Defendant has replied (Paper No. 32). Also before the Court is Plaintiff's Motion to Strike Declarations of Donald C. Deluca and Larry Brink (Paper No. 33). Upon a review of the motion and the applicable caselaw, the Court determines that no hearing is necessary (Local Rule 105.6) and that Defendant's Motion for Summary Judgment should be granted, and Plaintiff's Motion to Strike will be denied as moot.

I. BACKGROUND

The essential facts that gave rise to this action are undisputed. The Defendant Tennis Tutor, Inc. ["TTI"] is the manufacturer of a portable, battery operated tennis ball practice machine known as the Tennis Tutor. Plaintiff Holabird Sports Discounters ["Holabird"] is a mail order distributor of tennis equipment. Until September 1991, Holabird was a TTI distributor. A "Statement of Policy" provided by TTI to all its distributors states,

"Tennis Tutor will not sell, or will discontinue selling, Tennis Tutor machines to dealers who . . . [a]dvertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements." Declaration of William Greene, Exhibit 1. In violation of that policy, Holabird placed an advertisement for the Tennis Tutor machine in the October 1990 edition of *Tennis Magazine* that included a call for price notation. When TTI learned of that advertisement, it terminated Holabird as a Tennis Tutor dealer. TTI also told Holabird that it would be reinstated as a dealer if it agreed in writing to abide by the Statement of Policy. Holabird refused. Holabird claims that its termination, as well as the advertising policy itself, constitutes a violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1.

TTI presents several arguments in support of its motion for summary judgment. First, TTI argues that Holabird has offered no probative evidence that TTI's policy or Holabird's termination was a part of a contract, conspiracy or combination. Second, TTI argues that even if a conspiracy could be proven, Holabird could not demonstrate that the advertising policy had an adverse effect on competition. In fact, TTI argues, the policy actually enhances interbrand competition. Finally, TTI asserts that Holabird cannot prove that it suffered any actual antitrust injury.

Because the court finds that Holabird has not produced sufficient evidence that TTI entered into a contract, conspiracy or combination with any other entity in its adoption of it advertising policy, or in its termination of Holabird, the Court need only address that issue.

II. SUMMARY JUDGMENT STANDARD

Summary Judgment is proper if the evidence before the court, consisting of the pleadings, depositions, answers to interrogatories, and admissions of record, estab-

lishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Rule 56 mandates the entry of summary judgment against a party who, after reasonable time for discovery and upon motion, "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322. "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial [and] [t]he moving party is 'entitled to judgment as a matter of law.'" *Id.* at 323 (citations omitted).

"A mere scintilla of evidence is not enough to create a fact issue; there must be evidence on which a jury might rely." *Barwick v. Celotex Corp.*, 736 F.2d 946, 958-59 (4th Cir. 1984). "In the absence of such a minimal showing, a defendant should not be required to undergo the considerable expense of preparing for and participating in a trial." *Purity Products, Inc., v. Tropicana Products, Inc.*, 702 F. Supp. 564, 568 (D. Md. 1988) *aff'd* 887 F.2d 1081 (4th Cir. 1989).

The Supreme Court once cautioned that summary procedures should be used "sparingly in complex antitrust ligation where motive and intent play leading roles." *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 473 (1962). More recently, however, the Court has held that the principals of Rule 56 are as fully applicable in an antitrust action as in any other civil action. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In *Matsushita*, the Supreme Court reversed a court of appeals reversal of a district court's grant of summary judgment in an antitrust case. While observing that the plaintiff is entitled to have all favorable inferences to be drawn from the evidence, the Court noted that "antitrust law limits the range of permissible

inferences from ambiguous evidence in an antitrust case." *Id.* at 588.

III. DISCUSSION

A. The Conspiracy Requirement

Section One of the Sherman Antitrust Act prohibits, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C.A. § 1 (West Supp. 1992).

It is undisputed that a manufacturer may terminate a dealer at any time and for any reason and not offend the antitrust law, so long as the manufacturer is acting unilaterally and independently. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). Section 1 of the Sherman Act does not cover independent actions of a manufacturer, even if those actions unreasonably restrain trade. *Cooperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The burden is on the plaintiff to prove that the defendant manufacturer was not acting unilaterally.

Both parties correctly look to *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), to delineate the plaintiff's burden in establishing the conspiracy element in a § 1 action. *Monsanto* involved allegations that a manufacturer entered into an agreement with distributors to fix the resale price of the manufacturer's products. The court began its discussion of the conspiracy issue by noting that, under the *Colgate* doctrine, "[a] manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a dealer is free to acquiesce in the manufacturer's demand in order to avoid termination." 465 U.S. at 761. The Court went on to discuss the standard by which the sufficiency of the evidence of an agreement to restrain trade in a dealer termination case is to be judged:

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768.

In *Matsushita,* the Supreme Court elaborated upon its decision in *Monsanto*:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto,* we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."

475 U.S. at 588 (internal quotation and citations omitted).

B. TTI's Advertising Policy

TTI asserts that its advertising restraint is needed to enhance and protect its distribution network from "free riding" of national mail order discount houses. Without the restraint, TTI argues, mail order houses could "skim" sales from the local distributors who actually generated the sales in the first place by providing demonstrations, loaner machines, product information, hitting areas, and services. Motion at 10-11. This "skimming" would gradually erode the TTI dealer network.

TTI points out that its advertising restriction is quite narrow. It does not prohibit all discount price advertising, only advertisements in national print media. Dealers

are free to advertise discount prices in local media, catalogues, flyers or computer buying services. Holabird has, in fact, advertised Tennis Tutor machines through those media at a discounted price. Furthermore, TTI places no limits on dealers as to the price they must sell the machine. Dealers are free to sell at any price of their choosing. Motion at 10.[1]

Restraints to protect against "free riding" dealers have been routinely upheld as reasonable business policies. *See, e.g., Monsanto,* 465 U.S. at 762-63 (manufacturer can establish policy to seek to ensure that distributors earn sufficient profits to pay for product support services and to "see that 'free riders' do not interfere"); *O.S.C.*

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[1] The parties argue at length whether the actions of TTI constituted a conspiracy to fix prices—evaluated as a *per se* violation of the Sherman Act—or merely a nonprice vertical restraint analyzed under the rule-of-reason analysis. This Court need not resolve that issue as the Fourth Circuit has determined the *Monsanto* analysis of the burden of proof on the conspiracy element applies equally to both price and nonprice restrictions. *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989).

The Court notes, however, that the Supreme Court decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), provides strong authority to support the conclusion that TTI's advertising policy would be evaluated under the rule-of-reason, and not *per se* analysis. In *Sharp*, the Court noted that the rule-of-reason is the norm in § 1 cases, and that *per se* rules are only appropriate for "conduct that is manifestly anticompetitive, that is, conduct that would always or almost always tend to restrict competition and decrease output." *Id.* at 723. The Court expressed reluctance to extend *per se* treatment in vertical restraint situations and concluded "a vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *Id.* at 735-36. *See also, Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943 (E.D. Tex. 1991) (holding that alleged inability to place advertisements which include price was not *per se* illegal in the absence of other evidence of an agreement to fix price). Plaintiff's "evidence" in the form of "doctored" quotations and opinions of experts that advertising restrictions are the "functional equivalent" of price fixing agreement is not persuasive. *See* Opposition at 10 & 13-14.

Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 (9th Cir. 1986) (upheld as "plausible and justifiable explanation of [its] conduct" the manufacturer's concern regarding "its dealer's capacity to withstand erosion of profit margins caused by having to carry "free rider" mail order dealers); *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc.*, 698 F.2d 1011 (9th Cir.) *cert. denied* 464 U.S. 829 (1983). TTI asserts, and Holabird has offered no evidence to the contrary, that TTI unilaterally and independently formulated this policy.

TTI having produced a credible explanation of its policy, the burden is then on Holabird to produce evidence that tends to exclude the possibility of independent conduct on the part of TTI: "Once allegations of conspiracy made in the complaint are rebutted by probative evidence supporting an alternative interpretation of a defendant's conduct, the plaintiff must come forward with specific factual support of its allegations of conspiracy." *O.S.C. Corp.*, 792 F.2d at 1467.

C. *Holabird's Conspiracy Allegations*

Holabird points to several actions on the part of TTI in support of its claim of a conspiracy. First, Holabird points to two occasions when TTI contacted distributors to enforce its advertising policy. In June or July of 1990, William Greene, president of TTI ["Greene"] became aware that Sports Express, a distributor of tennis equipment, had placed an ad in *Tennis Magazine* that violated TTI's Statement of Policy. Although Sports Express was not yet a TTI dealer, it had placed the ad in an effort to determine potential interest in the machine. Greene immediately contacted that dealer and informed it that the ads violated TTI's policy and told Sports Express that, until the offending ads were removed, they would not be able to order Tennis Tutor machines. Sports Express responded that its practice was to respect manu-

facturer's policies and the ads would be removed. TTI then agreed to ship machines.

A similar scenario took place in November 1991 when Greene contacted one of its dealers, Associated Tennis Suppliers ["ATS"], to inform it that ads it placed in *Tennis Magazine* violated TTI's policy. ATS stated that it was not aware of the policy, apparently due to TTI's inadvertent failure to mail ATS a copy of the Statement. Once made aware of the policy, ATS agree to remove the offending ad and TTI agreed to continue to ship machines.

Second, Holabird asserts that the actions of TTI toward Holabird are "evidence of TTI's coercive efforts upon its dealers to secure illegal agreements." Opposition at 8. Holabird argues that the action of terminating Holabird for its offending advertisement itself, and offering to reinstate Holabird as a dealer if it agrees to abide by the policy, constitute the "something more" required by *Monsanto* to prove a conspiracy.

Finally, Holabird points to the fact that after terminating Holabird as a dealer, TTI contacted at least one dealer to prevent it from transshipping machines to Holabird. In February 1992, Greene learned the ATS had sold a Tennis Tutor machine to Holabird in violation of TTI's policy against transshipment. Greene contacted Matt Sherman, the manager of ATS, ["Sherman"] and explained that this violation could lead to its termination as a dealer. Sherman stated that he was not aware of the transshipment, but he would look into it. Sherman called Greene back and stated that another division had shipped the machine to Holabird without his knowledge, but in the future, ATS would respect TTI's policy against transshipment.

D. *Analysis*

Plaintiff relies heavily on *Monsanto* and *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960) to support its claim that these actions constitute a conspiracy. In *Monsanto,* the manufacturer informed two price cutting distributors that if they did not maintain the suggested resale price, they would not receive adequate supplies of the manufacturer's product. When one of the distributors did not assent, the manufacturer went to the distributor's parent company to request it put pressure on its subsidiary to comply. In response, the parent instructed the subsidiary to comply and it did. *Id.* at 765. The plaintiff also produced as evidence of the conspiracy a newsletter from one of the distributors to its dealer-customers. The newsletter was written after the distributor met with the manufacturer and discussed the manufacturer's efforts to "ge[t] the market place in order." The newsletter included language that the Court concluded could reasonably be interpreted as "referring to an agreement or understanding that distributors and retailers would maintain prices, and [the manufacturer] would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors." *Id.* at 766.

Parke, Davis, like *Monsanto,* involved a manufacturer's efforts to maintain retail price levels. After several retailers began offering their products at prices below Parke Davis' suggested minimum, Parke Davis instituted a program to promote observance of the minimum suggested retail prices. As part of that program, Parke Davis systematically contacted each of its wholesalers and informed them that it would refuse to sell to wholesalers who did not adhere to the policy, or to wholesalers who sold to retailers who did not observe the minimum retail prices. Parke Davis representatives also called on all the retailers to inform them of the policy. Each of the wholesalers and each of the retailers were informed that their

competitors were being similarly apprised of the policy. When that proved ineffective in curbing the price cutting, Parke Davis decided to modify the program to prohibit the advertising of discount prices. Representatives of the company again went to each of the retailers to elicit support for the policy. Parke Davis first obtained the tentative support of one of the largest retailers, Dart Drug, and then used the existence of that support to persuade other retailers. Parke Davis then went back to Dart Drug to report the support of the other retailers.

The Court found that in carrying out this series of actions, Parke Davis went beyond the limitations of the *Colgate* doctrine—"Parke Davis did not content itself with announcing its policy regarding retail prices and following this with a simple refusal to have business relations with any retailers who disregarded that policy." *Id.* at 45. With regard to that suspension of advertising, the Court observed:

> First it discussed the subject with Dart Drug. When Dart indicated willingness to go along the other retailers were approached and Dart's apparent willingness to cooperate was used as the lever to gain their acquiescence in the program. Having secured those acquiescences Parke Davis returned to Dart Drug with a report of that accomplishment. Not until all this was done was the advertising suspended and sales to all the retailers resumed. In this manner Parke Davis sought assurances of compliance and got them, as well as the compliance itself. It was only by actively bringing about substantial unanimity among the competitors that Parke Davis was able to gain adherence to its policy. It must be admitted that a seller's announcement that he will not deal with customers who do not observe his policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a

> manufacturer is unwilling to rely on individual self-interest to bring about voluntary acquiescence which has the collateral effect of eliminating price competition, and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to avoid such price competition, the customer's acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of concerted action induced by the manufacturer. The manufacturer is thus the organizer of a price-maintenance combination or conspiracy in violation of the Sherman Act.

Id. at 46-47.

Although there may be some superficial similarity between the actions deemed a conspiracy in *Monsanto* and *Parke, Davis,* and the actions of TTI, the Court finds that TTI's activities simply do not rise to the level of conspiracy proscribed by these decisions.[2] That conclusion is supported by recent decisions in which courts reached findings of no concerted action in the face of activities of defendants that were far more colorably "conspiratorial" than TTI's.

In *Parkway Gallery Furniture v. Kittinger/Pennsylvania House Group, Inc.,* 878 F.2d 801 (4th Cir. 1989), the Fourth Circuit applied the standard set forth in *Monsanto* and *Matsushita,* to uphold a district court's grant of summary judgment on the ground that the plaintiff had failed to provide adequate evidence of a conspiracy. In *Parkway Gallery,* the defendant manufacturer received complaints from its dealers that they were losing sales to discount dealers. As in the instant case, there was a concern that customers were visiting the complaining deal-

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[2] The Court also notes that the precedential value of *Parke Davis* "has been cast into some doubt by *Monsanto.*" *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1478 (9th Cir. 1986).

ers stores for shopping, display and sales assistance, but then ordering the furniture from the discount dealers. In response to those complaints, the manufacturer revised its retail marketing policy to prohibit dealers from soliciting or selling its furniture by mail or telephone order outside specified sales areas. Before promulgating the policy, the manufacturer surveyed its dealers for reactions to the new policy. After being contacted by the manufacturer, one dealer indicated that it " 'totally agrees' with the policy and 'will abide totally.' " Another indicated that it was "willing to 'come around' and abide by the ban." Another dealer notified the manufacturer of a violation and sought enforcement. *Id.* at 803 (quoting testimony of manufacturer's employees). Nonetheless, the court concluded that the terminated discount dealers had not met the burden to

> present evidence that tends to exclude the possibility that the alleged conspirators acted independently . . . . Any evidentiary fact may support a wide range of inferences, but the discrete inferences necessary under *Monsanto* to support a conspiracy theory simply do not flow from [the evidence] that [the manufacturer] sought assurances from its dealers that they would comply with its new marketing policy.

Id. at 805-06.[3]

---

[3] The Fourth Circuit acknowledged that its interpretation of *Monsanto* and *Matsushita* is somewhat at odds with decisions of the Eighth and Eleventh Circuits finding evidence of concerted action in the defendant manufacturers' contacts with plaintiff distributors' competitors. *See McCabe's Furniture v. La-Z-Boy Chair Co.*, 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); *Helicopter Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987). The court expressed the view that "those decisions have in effect misconstrued 'tends to exclude the possibility' of independent conduct to mean something like 'arguably consistent with the possibility of a conspiracy.' *Parkway Gallery*, 878 F.2d at 806 n.4 (citation omitted).

In *The Jeannery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988), the Ninth Circuit affirmed a magistrate's grant of a manufacturer's motion for judgment notwithstanding the verdict, holding that the plaintiff did not produce sufficient proof of a concerted action. In *The Jeannery*, the plaintiff presented evidence that the manufacturer exerted pressure on several retailers to capitulate to its suggested resale price, known in the industry as the "keystone" markup. The manufacturer told one retailer that if it did not comply with the policy, it would experience extreme difficulty in getting its orders filled. To another retailer, the manufacturer stated that, if it did not keystone, "orders could be lost, could be shipped to the wrong destination, or just never processed." *Id.* at 1159. The court noted that demands or threats, which could lead to a finding of concerted action, are to "be distinguished from mere 'exposition, persuasion, argument or pressure.'" *Id.* at 1158 (quoting *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1263 (9th Cir. 1983)). The court continued:

> Given that the manufacturer has every right to set the price at which it wants its goods resold and to terminate a dealer who undercuts that price, it is not surprising that a manufacturer would let a dealer know this policy. The greatest "difficulty" a dealer could experience in getting a product would be to suffer a termination. Certainly, then, a manufacturer may advise a dealer that its policy is to terminate a dealer who does not sell at keystone, or to favor filling orders placed by complying dealers. This is legitimate pressure to get a dealer to sell at keystone. No inference of antitrust conspiracy can be drawn from such evidence. It is ambiguous at best.

Id. at 1159.

A recent decision from the Southern District of Georgia further defines the amount of "pressure" a manu-

facturer can lawfully exert against distributors to enforce compliance with a marketing policy. In *Ben Sheftall Distributing Co. v. Mirta de Perales,* 791 F. Supp. 1575 (S.D. Ga. 1992), the plaintiff asserted that in an effort to force it to sell the manufacturer's products at a specified price, the manufacturer engaged in price discrimination between it and other distributors. When the plaintiff still failed to comply with the manufacturer's pricing plan, the manufacturer terminated the distributor. The distributor attempted to circumvent the termination by purchasing the manufacturer's products from another distributor in order to supply at least one of its customers. When the manufacturer discovered that the distributor was continuing to distribute its products, it contacted the customer and successfully persuaded it to stop purchasing products from the plaintiff. The plaintiff argued that these activities constituted a concerted effort to force it to comply with the manufacturer's policies. *Id.* at 1577-79.

The court granted the defendant's motion to dismiss. After a lengthy discussion of both *Parke, Davis* and *Monsanto,* the court concluded:

> The *Monsanto* Court was clear that unwilling compliance by dealers to avoid termination does not create an agreement and that compliance with a suggestion or announced condition does not amount to an implied agreement . . . . Where the actions involved are announcement and termination; monitoring of dealer performance through one's own employees or otherwise; or the use of third parties—to carry the message or to contact customers or replacement dealers—to effect a termination, no agreement is shown. At the same time, *Monsanto* leaves open the possibility of proving agreements by evidence that the manufacturer actively sought agreement through complex coercive means. Such evidence would naturally require a showing of individualized negotiations with dealers, meetings, repeated

> exhortations, and the use of third parties in a way other than to gather information or to effect termination.

Id. at 1582-83.

In *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*, 763 F.2d 604 (4th Cir. 1985), the Fourth Circuit upheld the district court's grant of summary judgment based on plaintiff's failure to produce sufficient evidence to show concerted action. In *Terry's Floor Fashions*, as in the instant case, the defendant carpet manufacturer had a policy prohibiting dealer-to-dealer sales. As proof of a conspiracy, plaintiff asserted, among other actions, that the manufacturer enforced that policy by instructing other distributors not to sell carpeting to the plaintiff. In affirming the summary judgment, the court stated that the manufacturer's action in instructing other distributors not to sell to the plaintiff was consistent with the manufacturer's policy prohibiting dealer-to-dealer sales, which was part of its overall marketing strategy, and thus was not probative of the alleged conspiracy between the manufacturer and its distributors. *Id.* at 614.

IV. CONCLUSION

TTI has proffered a rational business purpose for its advertising restriction. Having unilaterally formulated a policy to strengthen its dealer network, the Court finds it entirely reasonable that TTI be permitted to communicate that policy to its dealers. Under Holabird's construction of § 1, TTI would have no choice but to immediately terminate its dealer upon learning that the dealer had violated TTI's marketing policy, regardless of whether the violation was inadvertently or knowingly committed. Antitrust law simply does not require that result.

Accordingly, the Court finds that the actions of TTI are "as consistent with permissible competition as with illegal conspiracy," and do not support an inference of

antitrust conspiracy. Holabird has not produced evidence that "tends to exclude the possibility" that TTI acted independently.

For the above stated reasons, Defendant's Motion for Summary Judgment will be granted. As separate order will issue.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

Dated: October 30, 1992.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. WN-91-2208

HOLABIRD SPORT DISCOUNTERS

v.

TENNIS TUTOR, INC.

ORDER

In accordance with the foregoing Memorandum and for the reasons stated therein, IT IS this 30th day of October, 1992, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendant's Motion for Summary Judgment filed August 24, 1992 (Paper No. 28) is GRANTED;

2. That Plaintiff's Motion to Strike Declarations of Donald C. Deluca and Larry Brink is DENIED as moot;

3. That this case is hereby CLOSED;

4. That the Clerk of Court shall mail copies of the foregoing Memorandum and this Order to all counsel of record.

/s/ William M. Nickerson
WILLIAM M. NICKERSON
United States District Judge

APPENDIX D

EXCERPTS FROM DEPOSITION OF BILL GREENE TAKEN ON JUNE 16, 1992

* * * *

[6] Q. What is your position at Sports Tutor?

A. I am the president.

Q. Before the corporation was called Sports Tutor, Inc., did it have another name?

A. Yes.

Q. What was the other name?

A. Tennis Tutor, Inc.

Q. Was it incorporated as Tennis Tutor, Inc.?

A. Yes, it was.

Q. Was there a formal name change to make it Sports Tutor, Inc.?

A. Yes.

* * * *

[35] Q. At the time that the Tennis Tutor ball machine originally was sold, were there any other battery-powered tennis ball machines on the market in the [36] United States?

A. No.

Q. Since the Tennis Tutor ball machine originally was sold through today, are there any other battery-powered tennis ball machines on the market in the United States?

A. No.

* * * *

[151] Q. Now you also state in the last sentence "public court players can't use A.C.-powered ball machines because most public courts do not have accessible electrical power." What was your basis for making that statement?

A. Well, that statement—according to our research, 80 percent, approximately 70, 80 percent of public courts

do not have electric power. That means that if you have a facility that has five courts and only one of them has power, then only 20 percent of the courts have power and 80 percent don't have power, so it's not the number of facilities that don't have power, it's the number of courts that don't have power, ...

* * * *

(2)

Supreme Court, U.S.
FILED
AUG 30 1993

No. 93-182

In The

Supreme Court of the United States

October Term, 1993

HOLABIRD SPORTS DISCOUNTERS,

Petitioner,

v.

TENNIS TUTOR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Fourth Circuit correctly applied the standard of evidence required to prove a Section 1, Sherman Act conspiracy, contract, or combination by *Monsanto v. Spray-Rite Service Corp.* 465 U.S. 752, 104 S. Ct. 1464 (1984), in affirming a summary judgment in favor of a manufacturer when there was no evidence of an agreement other than the manufacturer's routine communication with two dealers who inadvertently violated the manufacturer's policy restricting price advertisements?

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No. 93-182

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HOLABIRD SPORTS DISCOUNTERS,

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v.

TENNIS TUTOR, INC.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Introduction and Procedural Posture

This Petition for Certiorari arises from Respondent Tennis Tutor, Inc.'s ("TTI") termination of its former dealer, Holabird Sports Discounters ("Holabird"), the petitioner herein, a former mail order house distributor of TTI's main product, a tennis ball machine known as the Tennis Tutor. Petitioner's Appendix. ("Pet. App.") 5a. On August 5, 1991, Holabird filed a Complaint charging that its termination was in violation of Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1. Pet. App. 3a, 6a.

Holabird alleged that TTI's imposition and enforcement of an advertising restriction violated Section 1 of the Sherman Act. Pet. App. 3a. After approximately one year of full blown discovery, TTI moved for summary judgment on several alternative grounds. *Id.* On October 30, 1992, the District Court granted summary judgment in favor of TTI on the sole ground that Holabird had failed to produce sufficient evidence to show that TTI had entered into a contract, combination or conspiracy in restraint of trade. Pet. App. 4a. The Court of Appeals affirmed. *Id.*

Holabird's factual characterizations in its Petition are at times seriously inaccurate and outright misleading. In particular, Holabird continuously uses the word "agreement" with respect to TTI's advertising restriction as if TTI and its dealers actually used that word or acknowledged the existence of an agreement. In reality, TTI never sought agreement of its dealers to its advertising policy. TTI presented its policy to its dealers, and each dealer made his own choice as to whether to comply. In fact, the District Court reprimanded Petitioner's counsel for offering "evidence" of a conspiracy in the form of "doctored" quotations, and other questionable methods of argument. Pet. App. 10a, footnote 1.

Hence, Holabird's recitation of the facts in its Petition are suspect and should be viewed with caution. TTI's Opposition will correct the factual record as portrayed in the Petition.

B. TTI's Advertising Policy and the Business Justification for It

TTI's advertising policy is contained in its Statement of Policy it provides to all its dealers nationwide. Pet. App. 5a. The pertinent portions of the Statement of Policy provide as follows:

> . . . In line with the above policy statements, Tennis Tutor will not sell, or will discontinue selling, Tennis Tutor ball machines to dealers who:
>
> * * *
>
> 3. Advertise the Tennis Tutor in any general circulation regional or national publication for less than suggested retail price, including call for price advertisements.

Pet. App. 6a.

TTI independently created its advertising policy without any input from its dealers. Pet. App. 2a.

The advertising restriction is narrowly crafted to meet its objective of limiting only one type of price advertising. Pet. App. 9a. It does not prohibit all discount price advertising, only advertisements in the national print media at prices below manufacturer's suggested retail price. *Id.*

TTI has 126 dealers nationwide. Pet. App. 2a. TTI manufactures a portable battery-powered tennis ball practice machine known as the Tennis Tutor. *Id.* TTI's dealers are free to advertise discount prices in the local media, catalogues, flyers or computer buying services. Pet. App. 10a. Holabird has in fact used these techniques

to advertise at discount prices. *Id.* Dealers are free to sell the Tennis Tutor machine at any price, including a discount price. *Id.*

The reason TTI needs the advertising restraint is to protect and enhance its distribution network from national mail order discount houses such as Holabird who "skim" sales from local dealers who actually generated the sales. Pet. App. 9a. The restraint is necessary to prevent "free riding" by national mail order discount houses such as Holabird. Pet. App. 2a. This prohibition against "free riding" is necessary to maintain TTI's national distribution network which would deteriorate if "free riding" continued unchecked. Pet. App. 2a, 9a.[1] "Free-riding" is a recognized anticompetitive phenomenon against which restraints can be lawfully adopted to curb its pernicious effects. Pet. App. 10a, 11a.

C. TTI's Termination of Holabird as a Dealer

In violation of TTI's policy, Holabird placed a "call for price" advertisement for the Tennis Tutor machine in

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[1] "Free-riding" occurs when a national mail order house such as Holabird takes advantage of customer services offered by local dealers. TTI dealers offer a full range of services necessary to sell the Tennis Tutor such as demonstrations, loaner machines, etc., not offered by a national mail order house such as Holabird. Without the advertising restriction, customers would go to the local dealer for the demonstrations, become convinced to buy the Tennis Tutor, and then actually purchase the machine at a lower price from Holabird. Hence, Holabird is "free-riding" off the efforts of local dealers who actually generated the sales because Holabird provides no services. Pet. App. 2a, 3a.

the October 1990 edition of *Tennis Magazine*, a national publication. Pet. App. 3a, 6a. On September 17, 1990, when TTI first discovered the violation of its unilateral policy against such advertising, it terminated Holabird as a TTI dealer. Pet. App. 3a.

On October 11, 1990, Holabird's attorney, Mr. Stanley Fine, sent a letter to TTI's president, Mr. William Greene, which concluded with a thinly-veiled threat as follows: "Your failure to reinstate my client [as a TTI dealer] within ten days of the date of this letter will result in my client taking appropriate legal action against you for damages and losses." Res. App. 1a, 2a.[2]

In response to the threat of a lawsuit, TTI told Holabird that it would be reinstated as a dealer if Holabird acknowledged in writing that it would abide by TTI's advertising policy in the future. Pet. App. 6a. Holabird refused and has not been a dealer for TTI since then. *Id.*

D. TTI's Communications With Two Dealers Explaining TTI's Advertising Policy

TTI had communications regarding the advertising restriction with only two of its 126 dealers other than Holabird. Pet. App. 11a, 12a. Those two dealers were Sports Express and Associated Tennis Suppliers ("ATS"). *Id.* TTI's one-time contact with these two dealers had no relationship at all to Holabird's termination. *Id.* The contact with Sports Express occurred in June 1990, three

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[2] "Res. App." means Respondent's Appendix attached hereto.

months before Holabird's termination. *Id.* The contact with ATS occurred in November 1991, 15 months after Holabird's termination, and months after Holabird filed its lawsuit against TTI. *Id.*

In June or July 1990, Greene noticed that Sports Express had placed an ad for the Tennis Tutor in the June 1990 edition of *Tennis Magazine*, which ad violated TTI's advertising restriction. Pet. App. 11a. At the time, Sports Express was not a dealer of TTI, but had placed the advertisement to gauge customer interest, and hence was not aware of TTI's restriction on advertising in national circulation magazines. Pet. App. 3a. Greene contacted Sports Express about the offending advertisement. Pet. App. 3a, 11a, 12a. Sports Express responded that it was its practice to comply with manufacturers' distribution policies and would voluntarily comply in the future. Pet. App. 3a, 11a, 12a.

In November 1991, Greene contacted ATS, a dealer of TTI to inform ATS that it had violated the advertising prohibition in the November issue of *Tennis Magazine*. Pet. App. 12a. ATS responded that it was not aware of the policy because TTI had inadvertently failed to mail ATS a copy of the "Statement of Policy," which contained the advertising prohibition. *Id.* After this discussion with TTI's President, William Greene, ATS stated it would remove the offending ad and would voluntarily comply with the advertising restriction in the future. Pet. App. 3a, 12a.

Finally, after Holabird's termination as a TTI dealer, TTI contacted at least one dealer to prevent it from "transshipping" or "diverting" machines to Holabird in

violation of TTI's policy against transshipment. Pet. App. 12a. The dealer, ATS, stated it was not aware of the transshipping and investigated the incident. *Id.* The ATS division which sold TTI's product reported to TTI that another division of ATS had shipped the machine to Holabird without the appropriate division's knowledge or permission. *Id.* ATS stated that it would respect TTI's policy against transshipment and voluntarily would comply with the policy in the future. *Id.*

REASONS FOR DENYING THE WRIT

The Fourth Circuit's decision affirming the District Court's grant of summary judgment is wholly unremarkable and invokes none of the grounds upon which certiorari is appropriately granted. The decision to grant summary judgment to TTI, after extensive discovery, is nothing more than a routine application of the law to the facts in the aftermath of the Court's decisions in *Monsanto, supra,* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

These two decisions increase the plaintiff's burden of proof on the conspiracy element of Section 1 of the Sherman Antitrust Act, limiting the use of ambiguous circumstantial evidence, and requiring the plaintiff to offer evidence which tends to refute the fact that TTI acted unilaterally and independently in monitoring and enforcing its advertising policy. Moreover, since the only facts pertinent to a possible conspiracy Holabird was able to muster actually demonstrate that no conspiracy existed at all, the application of Fourth Circuit decisions and the

decisions of the other circuits would yield the same result: summary judgment in favor of TTI.

This result is correct because TTI's behavior in interacting with its dealer evokes none of the coercion required for a vertical conspiracy and is substantially below that level of conduct necessary to get evidence of a conspiracy to a jury. In short, the undisputed facts in this case are unexceptional in the wake of *Monsanto* and *Matsushita* and have led to a commonplace and expected result: summary judgment for TTI.[3]

ARGUMENT

Holabird's attempt to upset the District Court's and Court of Appeals' straightforward application of *Monsanto* and *Matsushita* should be rejected out of hand. The interaction in this case between the manufacturer, TTI, and three out of its 126 dealers – Holabird, ATS, and Sports Express – is so sporadic and unrelated that the conduct does not even come close to evidence of a conspiracy sufficient to get to a jury.

Moreover, Holabird's grandiose attempt to create an alleged conflict in the circuits based on the Fourth Circuit's decision in *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), is based on the misreading of a footnote in that case. The *Parkway Gallery* court was not admitting the existence of a conflict in the Circuits, but merely pointing

[3] There appears to be little dispute as to the pertinent facts relating to the conspiracy evidence. Pet. App. 5a.

out by implication that different facts yield different results under the *Monsanto* test. *Parkway Gallery*, 878 F.2d at 806 fn. 4.

A. The Decision Below Correctly Applied the Requirement of *Monsanto* and *Matsushita* That Evidence of a Conspiracy Must Tend to Exclude the Possibility That TTI Acted Independently in Enforcing Its Advertising Policy

(1) Holabird's Burden of Proof Under the *Monsanto* and *Matsushita* Cases

The law is clear that a manufacturer may terminate a dealer at any time for any reason and not offend the antitrust laws, so long as the manufacturer has acted independently in doing so. *United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 468 (1919). The Supreme Court in *Monsanto* properly reaffirmed this principle and explained as follows:

> Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

Monsanto, 465 U.S. at 761, 104 S. Ct. at 1469.

In *Monsanto*, the Supreme Court established the plaintiff's burden of proof on the conspiracy element of a vertical restraints case. That burden of proof is as follows:

> [T]here must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that

> reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Id. at 768, 104 S. Ct. at 1473.

In *Matsushita*, the Supreme Court elaborated on the plaintiff's burden of proof set out in *Monsanto*:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto*, we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 *must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.*

Matsushita, 475 U.S. at 588 (internal quotation and citations omitted). [Emphasis added.]

(2) The Application of the *Monsanto* Test to the Facts of the Instant Case

The Courts below correctly applied the *Monsanto* and *Matsushita* decisions to hold that Holabird had not presented sufficient evidence of a conspiracy to get to a jury. It is clear that TTI's termination of Holabird did not create a conspiracy and that Sports Express's and ATS's voluntary compliance with TTI's advertising policy does not constitute a conspiracy.

If the manufacturer can offer a legitimate business reason for terminating a dealer, the presumption of independent action is strengthened. *H.L. Hayden Co. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1014-16 (2d Cir. 1989); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 663 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987). TTI's business reason for terminating Holabird was for Holabird's violation of the TTI advertising policy by Holabird's placing a "call for price" advertisement in the October 1990 edition of *Tennis Magazine*. Pet. App. 6a. A manufacturer's termination of a dealer because it failed to comply with the manufacturer's advertising policies is a legitimate reason for termination. *Cranfill v. Scott & Fetzer Co.*, 773 F. Supp. 943, 956 (E.D. Tex. 1991). *See also O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1468 (9th Cir. 1986), (a manufacturer's termination of a dealer because it operated as a mail order house is a legitimate reason for termination).

In the complete absence of any dealer complaints leading up to the termination of Holabird, there is no question that there was no evidence of a "common scheme" to terminate Holabird. TTI's termination of Holabird does not support any inference of a conspiracy. *Monsanto*, 465 U.S. at 768, 104 S. Ct. at 1473.

In addition, Holabird has misapplied the test of *Monsanto* by completely ignoring Holabird's burden of proof to refute the presumption that TTI acted unilaterally in informing ATS and Sports Express of TTI's advertising policy. Pet. App. 11a, 12a. It is clear that TTI may maintain an open channel of communications with its dealers about this policy, it may monitor compliance with this policy, and it may seek to eliminate, through unilateral

actions, "free riding" dealers by adopting the appropriate marketing strategies. *Monsanto*, 465 U.S. at 762-63, 104 S. Ct. at 1470. TTI's "strongly felt concern" about its limited and narrowly crafted advertising restraint "does not necessarily mean that it has done more than the *Colgate* doctrine allows." *Id.*

Thus, there is no question that TTI's normal business procedure of monitoring compliance with its advertising restraint by discussing two prohibited *Tennis Magazine* ads with ATS and Sports Express is well within the realm of unilateral action envisioned by *Colgate* and reinforced under *Monsanto*. *Id.* The law is unequivocal that voluntary compliance by a dealer in a manufacturer's policy does not result in an antitrust conspiracy, even if the distributor disagrees with the policy and is complying in order to avoid termination. *Monsanto*, 465 U.S. at 761, 104 S. Ct. at 1469. ("[A] dealer is free to acquiesce in the manufacturer's demand in order to avoid termination."); *United States v. Parke-Davis & Co.*, 362 U.S. 29, 47, 80 S. Ct. 503, 513 (1960).

This principle of compliance voluntarily compelled by a disagreeable business choice does not rise to the level of "coercion" necessary for an antitrust conspiracy. 7 Areeda, *Antitrust Law*, ¶ 1446 at 85-86 (1986). Professor Areeda states that, after *Monsanto*, "no agreement is formed when a dealer unwillingly complies solely because he wishes to avoid termination." *Id.* ¶ 1451e at 128. If mere voluntary compliance alone could prove an unlawful agreement, the *Colgate* doctrine would be rendered meaningless. *Monsanto*, 465 U.S. at 761, 104 S. Ct. at 1469.

Thus, in order to find a vertical conspiracy, Holabird must provide proof of a well-established pattern of coercion evidenced by a complex plan to enforce the vertical restraints shown by unambiguous evidence such as terminations of dealers, wide-scale dealer contacts, and employment of third parties to carry out enforcement schemes. *Parke-Davis*, 362 U.S. at 45-46, 80 S. Ct. at 512-13; *Ben Sheftall Distributing Co. v. Mirta de Perales*, 791 F. Supp. 1575, 1582-83 (S.D. Ga. 1992).

Holabird has offered no proof of a complex enforcement scheme. Instead, Holabird has focused inordinately on two isolated contacts TTI had respectively with Sports Express and ATS. These communications revealed only that Sports Express and ATS elected to voluntarily comply with TTI's advertising policy. In the absence of coercion and a conscious commitment to a common scheme, there is no evidence of a conspiracy. *Monsanto*, 465 U.S. at 764, 104 S. Ct. at 1471; *Parke-Davis & Co.*, 362 U.S. at 45-46, 80 S. Ct. at 512-13.

B. The Decision Below Does Not Conflict With the Decisions of Any Other Circuit

The Fourth Circuit's decision in this case is not in conflict with the law in other circuits, nor would have adjudication by another circuit created a different result. Holabird's purported evidence of a conspiracy is so weak that it would have lost at summary judgment in the Eighth and Eleventh Circuits as well.[4]

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[4] Based on one innocuous footnote by the Fourth Circuit in its Opinion in the *Parkway Gallery* case, Holabird claims that

A quick examination of the facts and the law in the cases cited by Holabird demonstrates the weakness of the Petitioner's arguments. Holabird has in essence already conceded that the Fourth Circuit correctly applied the law of its own circuit as set out in *Parkway Gallery*, 878 F.2d 801 (4th Cir. 1989). *See* Petition at 6. Rather, Holabird is claiming that *Parkway Gallery* is in conflict with *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988), and *Helicopter Support Systems v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1535-36 (11th Cir. 1987). *See* Petition at 6, 7. Finally, Holabird argues that *Parkway Gallery* also conflicts with *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

An examination of these cases reveals no conflict or inconsistent result as to Holabird. In *Parkway Gallery* the Court found no conspiracy based on the manufacturer's adoption of a territorial limitation policy for solicitation of telephone sales, even though the dealers participated in the formulation of the policy and the manufacturer received assurances of compliance from some dealers. *Parkway Gallery*, 878 F.2d at 806. Both *McCabe's Furniture* and *Hughes Helicopter* involved the standard facts of *Monsanto* and *Parke-Davis*, including, but not limited to: dealer complaints, subsequent termination in response to the complaints, enforcement schemes and post-termination confirmation letters which indicated "the problem is taken care of." *See McCabe's Furniture*, 798 F.2d at 326-27;

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both the *Parkway Gallery* case and the instant case are in conflict with Eighth and Eleventh Circuit decisions. Holabird's Petition for Writ of Certiorari ("Petition") at 5, 6.

Hughes Helicopter, 818 F.2d at 1535. These facts evidence a complex enforcement scheme which is a far cry from Holabird's evidence of voluntary compliance by Sports Express and ATS.

Moreover, *Isaksen* does not change the result. In *Isaksen* there was direct evidence of resale price fixing demands and complicated methods of coercion. *Isaksen*, 825 F.2d at 1162-63. The *Isaksen* court merely stated that evidence in the form of a direct admission such as a dealer saying, "I agree to participate in price-fixing," is not necessary to survive judgment. *Id.* at 1164.

Again, *Isaksen* does not create a conflict with *Parkway Gallery* which in no way requires outright direct admissions of the antitrust violation to survive summary judgment. *Parkway Gallery*, 878 F.2d at 806. Nor does footnote 4 in *Parkway Gallery* admit the existence of a conflict with the Eight Circuit (the *McCabe* case) or the Eleventh Circuit (the *Hughes Helicopter* case). In both *McCabe* and *Hughes Helicopter* the evidence of conspiracy was compelling and way beyond the "low-level" sporadic and isolated conduct exhibited by TTI in the instant case. The result for Holabird would have been the same in both these other circuits: an adverse ruling at summary judgment.

Consequently, the *Parkway Gallery* court's parenthetical remark contained in footnote 4 that the Eighth and Eleventh Circuits have "misconstrued" the "tends to exclude" requirement of *Monsanto* and *Matsushita* has no bearing on *Holabird* because Holabird was not able to point to any facts consistent with the inference of a conspiracy. *Parkway Gallery*, 878 F.2d at 806 fn. 4. There is no doubt that *Parkway Gallery* was correctly decided under

APPENDIX

APPENDIX

October 11, 1990

CERTIFIED MAIL
RETURN RECEIPT
REQUESTED

Mr. William Green,
President
Tennis Tutor, Inc.
2612 West Burbank Blvd.
Burbank, California 91505

Green Exh. 21 for I.D.
Witness: Bill Green
Date: 6-17-92
Rebecca Corral, RPR/CSR
#7021

Dear Mr. Green:

As I indicated to you in our recent conversations, my client, Holabird Sports Discounters, was not in violation of your company's Statement of Policy when Holabird placed an ad for Tennis Tutor in the October, 1990 issue of *Tennis* magazine.

Your company's Statement of Policy uses the words "call for price advertisements", while my client's advertisement used the word "call". The word "call" means a lot of things, such as description of item, availability of size or model, description of model, as well as general questions concerning the merchandise involved. The word "call" as used in this ad *does not in any way mean* call for price advertisements.

In your conversation with David Hirshfeld on September 17, 1990, you stated that you would not ship Holabird any goods for a period of one year because of the ad placed in *Tennis* magazine. Your action is unfounded, arbitrary and illegal. In our conversation of September 26, 1990, I requested that you rescind your decision to stop shipment of goods to my client for one

year and reinstate my client immediately. You indicated that you would not do this.

It is apparent that others have violated your policy and you have not taken any action against them. You have acted in an arbitrary, as well as discriminating, manner by taking action against Holabird, which did not even violate your policy. Your failure to supply goods to my client will result in excessive damages and future losses to my client. I request that you reconsider your position and reinstate Holabird Sports Discounters as a supplier immediately.

Your failure to reinstate my client within ten days of the date of this letter will result in my client taking appropriate legal action against you for these damages and losses. I urge you to give this matter your immediate and preferred attention.

Sincerely,

Stanley S. Fine

SSF:bmh
cc: Holabird Sports Discounters